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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND MIKHI,

Defendant and Appellant.

B265984

(Los Angeles County  
Super. Ct. No. LA075273)

APPEAL from an order of the Superior Court of  
Los Angeles County, Gregory A. Dohi, Judge. Affirmed.

Paul R. Kraus, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Senior Assistant  
Attorney General, Paul M. Roadarmel, Jr., Stacy S. Schwartz and  
Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and  
Respondent.

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## **INTRODUCTION**

Raymond Mikhi appeals from an order requiring him to pay restitution in the amount of \$66,604.13. Mikhi argues the trial court's calculation was an abuse of discretion because it was based on speculation and an inappropriate cost model. We conclude the trial court's method of calculating the restitution award was rational and based on reasonable inferences from the evidence presented at trial. We therefore affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

On May 7, 2014 a jury found Mikhi guilty of cultivating marijuana, possessing marijuana with intent to sell, and theft of utility services over \$950 to grow and process the marijuana. This court affirmed Mikhi's conviction on all counts but remanded the matter to the trial court with instructions to stay Mikhi's sentence on either the conviction for cultivation or the conviction for possession with intent to sell. Meanwhile, the trial court held a restitution hearing under Penal Code section 1202.4.<sup>1</sup>

At the restitution hearing the court stated it was considering the evidence the parties had presented at trial, including testimony by Los Angeles Department of Water and Power (DWP) employee Robert Putnam. Putnam testified that on September 4, 2013, the day the police searched Mikhi's home, he surveyed the electrical equipment Mikhi had installed. Putnam calculated the amount of electricity the equipment used by surveying the lights, fans, duct blowers, and air conditioners Mikhi had installed. Putnam calculated this equipment would

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

use 429.03 kilowatts of electricity daily. He then estimated a monthly consumption of electricity based on this daily amount. Putnam testified the theft of electricity likely began in February 2011 because at that time someone transferred the DWP account to the name of Mikhi's brother and there was "an abrupt drop in power consumption by two thirds starting around that date." Using August 2013 as the completion date for the theft of electricity, Putnam calculated the total theft as \$66,604.13.

At the restitution hearing Mikhi presented several exhibits, which the court received into evidence without objection. These exhibits included a real estate listing showing that the house where Mikhi conducted his marijuana operation was listed for sale from February 2011 to June 2011 and a lease Mikhi had signed for the house from December 20, 2012 to December 20, 2014.<sup>2</sup> Counsel for Mikhi argued, based on this evidence, that the court should not use the February 2011 start date Putnam used for the theft of electricity because the theft could not have commenced before Mikhi took legal possession of the property on December 20, 2012. Counsel for Mikhi did not challenge any part of the DWP's calculation other than the February 2011 start date Putnam used.

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<sup>2</sup> Counsel for Mikhi argued there could not have been a marijuana growing operation from February to June 2011 when the property was listed and "displayed in MLS and zillow.com . . . for sale." The trial court asked whether there was any evidence of open houses or that "the realtors caravan" had been at the property during the time it was on the market. Counsel for Mikhi apparently also showed the court pictures of the interior of the house that indicated the house was empty, but the court did not receive those photographs into evidence, and they are not in the record.

The trial court ruled the People had met their “low burden of establishing the amount of the loss” was \$66,604.13,<sup>3</sup> and therefore the burden shifted to Mikhi “to present evidence contesting the claimed amount.” The court concluded, however, that Mikhi failed to rebut the People’s evidence. The court noted that, “[b]ased on his four-year-long connection with the property and his apparent familiarity with the electrical setup, it is reasonable to conclude that [Mikhi] was primarily responsible for the grow operation.”

The court ordered Mikhi to pay \$66,604.13 in restitution to the DWP for the theft of electricity he used to cultivate the marijuana. Mikhi timely appealed.

## DISCUSSION

Section 1202.4, subdivision (a), provides in relevant part: “(1) It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime. [¶] . . . [¶] (3) The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay . . . the following: [¶] . . . [¶] (B) Restitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment.” Section 1202.4, subdivision (f), provides that, “in every case in which a victim has suffered economic loss as a result of the

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<sup>3</sup> The court stated, “The \$66,604.13 figure corresponds roughly to the bimonthly amounts that Mr. Putnam calculated on the basis of the load survey for February [2011] through August 2013 (ranging from \$4,736.52 to \$4,897.08), divided in half to obtain a monthly amount, multiplied by 21 months between February 7, 2011 and September 4, 2013.”

defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." The trial court must order the defendant to reimburse the victims of his or her crimes for all economic loss caused by the defendant's conduct. (See *Luis M. v. Superior Court* (2014) 59 Cal.4th 300, 304 (*Luis M.*); *People v. Aguilar* (2016) 4 Cal.App.5th 857, 862.)

The standard of proof at the restitution hearing is preponderance of the evidence, not beyond a reasonable doubt, and we review restitution orders under section 1202.4 for abuse of discretion. (*People v. Lehman* (2016) 247 Cal.App.4th 795, 801; *People v. Santori* (2015) 243 Cal.App.4th 122, 126.) At the hearing, "the prosecution bears the initial burden of making a prima facie showing of the victim's economic loss. Once that showing is made, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim." (*People v. Aguilar, supra*, 4 Cal.App.5th at p. 862.) "“When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.”" (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1320; see *People v. Millard* (2009) 175 Cal.App.4th 7, 26 ["“[a] victim's restitution right is to be broadly and liberally construed”"].)

Here, the trial court relied on a DWP employee's estimate of the daily electricity usage associated with Mikhi's marijuana growing operation, converted this usage to a monthly amount, and then multiplied this amount by the approximate number of months the account had been in the name of Mikhi's brother (until Mikhi's arrest). The court's methodology was well within its discretion. (See *People v. Phu* (2009) 179 Cal.App.4th 280, 283 ["“[s]entencing judges are given virtually unlimited discretion as

to the kind of information they can consider” in determining victim restitution”]; *People v. Prosser* (2007) 157 Cal.App.4th 682, 690 [“[i]n determining the amount of restitution, all that is required is that the trial court “use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious”].) Indeed, the court in *People v. Phu, supra*, 179 Cal.App.4th 280 approved a virtually identical method of calculating a restitution award for “an illegal diversion of electrical power” for marijuana cultivation based on the equipment in the house and the date of a change in the utility service. (See *id.* at pp. 283-284; see also *id.* at pp. 284-285 [“it was reasonable to infer that, rather than an idea that occurred to defendant during his theretofore lawful occupancy of the home, the marijuana growing operation had been planned at the time defendant became the utilities subscriber”].) Although, as the trial court noted in this case, the DWP’s calculations were “admittedly imprecise,” any “lack of precision” was “due entirely to [Mikhi’s] actions in bypassing the meter.” (See *People v. Baker* (2005) 126 Cal.App.4th 463, 469 [“the lack of personal knowledge was not due to any fault by the owner-victims; rather, it was defendant’s misappropriation” that created the uncertainty].)

Mikhi argues that the trial court’s restitution award was “based on a cost model” the Supreme Court “prohibited in” *Luis M., supra*, 59 Cal.4th 300. In *Luis M.* the Supreme Court held that a cost model based on city-wide averages for remediation costs was “unavailable as a basis for determining restitution orders” for individual juvenile vandalism offenders and did not support the restitution award for graffiti damage in that case under Welfare and Institutions Code section 730.6, a restitution statute for minors that is parallel to section 1202.4. (*Id.* at pp. 303, 304, 308.) Mikhi argues the trial court violated the holding of *Luis M.* by relying on an estimate with no

“allowance for changes or transitions in the size of the marijuana grow.” He contends that under *Luis M.* the “evidence supporting a restitution award needs to be based on the individual conduct of a defendant” and “reliance on a cost model does not provide a basis for disregarding evidence specific to the defendant’s conduct inconsistent with the cost model which may reduce the restitution award.”

“*Luis M.* does not bear the weight defendant accords it.” (*People v. Aguilar, supra*, 4 Cal.App.5th at p. 864.) In *Luis M.* the Supreme Court held that while the trial court, in calculating the amount of restitution, “need not ascertain the exact dollar amount of . . . losses . . . , its calculation . . . must have some factual nexus to the damage caused by the minor’s conduct.” (*Luis M., supra*, 59 Cal.4th at p. 309.) There was such a factual nexus here. The trial court did not base the restitution award on an average of stolen electricity used for marijuana cultivation operations and apply that value to Mikhi. (Cf. *ibid.* [juvenile court erred by basing “its estimate on an *average of all costs* of graffiti cleanup rather than a rational estimate of costs occasioned by [the minor’s] conduct”].) The trial court based its restitution award on information relating solely to Mikhi’s house and equipment.

Mikhi also suggests an alternative restitution calculation, based on electricity used by a 2009 marijuana cultivation operation at the same property, that presumably yields a smaller restitution amount. And perhaps it does, although Mikhi does not calculate or state what that amount would be. That there may have been an alternative method of calculating restitution, however, does not mean it was an abuse of discretion for the trial court to use Putnam’s calculations as a basis for the restitution award. The method chosen by the trial court was rational, reasonable, and not arbitrary. (See *People v. Giordano* (2007) 42

Cal.4th 644, 663-664 [“a trial court has broad discretion to choose a method for calculating the amount of restitution” as long as the court employs “a method that is rationally designed to determine the surviving victim’s economic loss”]; *People v. Pangan* (2013) 213 Cal.App.4th 574, 579 [restitution award must be “the product of a ‘reasonable’ method and produce[ ] a ‘nonarbitrary result’”].) The fact that it may not have been the only rational, reasonable, and nonarbitrary method does not mean it was an abuse of discretion.

### **DISPOSITION**

The order is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.